Supreme Court, U.S.
FILED
OCT 15 1997
CLERK

(3)

No. 97-411

In The

Supreme Court of the United States

October Term, 1996

WILLIAM H. TOBIN, FRANK J. CANONICO, III, LARS O. ERIKSSON, DANTE E. PICCONE, KENNETH R. RICKETTS, LOUIS TREFZ, LAWRENCE J. WILLINGER, GERALD A. WOOLF,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., GE PENSION TRUST,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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4 pp

Respondents' contention that the holding in *Firestone Rubber & Tire Co. v. Bruch*, 489 U.S. 101 (1989) controls this case is incorrect. *Firestone* held that all ERISA plans would be reviewed *de novo*, unless the plans granted the administrators discretion to interpret their terms. The conflict created by the unfunded plan in that case was held not to be a controlling concern because the benefit denial was subject to *de novo* review. This Court expressly stated,

> . . . we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under § 1132(a)(1)(B), the de novo standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest.

Id., 489 U.S. at 115.

In *Firestone*, the plan administrator did not have discretion to interpret the plan. This Court's comments about the review to be afforded in such cases when the administrator's interests conflict with the beneficiaries' interests were not essential to the decision, and were, therefore, dicta. As this Court has held, "It is in the holdings of our cases, rather than their dicta, that we must attend, ..." *Kokkonen v. Guardian Life Ins. Co.*, __ U.S. __, 128 L. Ed. 2d 391, 396 (1994).

Respondents claim that, where plan administrators are consistent in their interpretations, their interpretations should be entitled to "more deference," citing *Hutchins v. Champion Int'l Corp.*, 110 F.3d 1341 (8th Cir. 1997); *Cash v. Wal-Mart*

Group Health Plan, 107 F.3d 637 (8th Cir. 1997); and *Brogan v. Holland*, 105 F.3d 158 (4th Cir. 1997). None of those cases provides for "more deference." Each of them applies a five-prong test as the standard of deferential review, one prong of which is whether the plan's terms were defined consistently. Of course, GE was inconsistent in granting Plant Closing Benefits in Milwaukee but denying those benefits to Petitioners in Malvern, Pennsylvania.

Respondents' contention that Petitioners have already received *de novo* review is disingenuous. It is true that the District Judge stated in passing that he would have upheld the denial of benefits to Petitioners under *de novo* review. *See* App. B to Petition 22a, n.14. The Court of Appeals reviewed solely for abuse of discretion. *See* App. A to Petition 8a. If Petitioners are entitled to *de novo* review, they have been denied their right to appellate review of the District Judge's determination. The District Judge's decision on the point was not undisturbed by the Court of Appeals. It was ignored. The Court Appeals did not allow *de novo* review.

Much of Respondents' Brief is directed to their arguments that, on *de novo* review, they should be successful.[1] Respondents suggest that the fact that GE did not deny all severance benefits to Petitioners somehow means that GE did not violate its plan provisions for Plant Closing Benefits. It appears that GE's argument is that because it could have adopted a different inappropriate basis for refusing the Petitioners Plant Closing

1. Respondents try to demonstrate that General Electric's two operations in the Malvern location were in one facility by claiming that the two operations were under a "common roofline." Respondents' Brief in Opp. 3-4. No competent witness or other evidence in the record establishes that there was a common roofline. In fact, the two connected buildings do not share a common roofline. In any event, the nature of the roofline should not be a basis for interpreting ERISA plans that do not expressly state that rooflines are criteria for interpreting their provisions.

Benefits, the basis it chose was not inappropriate. There is, of course, no logic behind that argument. Had GE inappropriately invoked the "successor employer" clause, it would have been liable to a legal challenge.[2] The mere fact that GE could have been wrong on more than one ground does not obviate the conflict it faced when the decision was made.

More to the point, Respondents' arguments beg the immediate question whether this Court should grant the Petition and clarify the appropriate standard of review. The Petition sets out all the reasons for this Court to grant it and establish the standard for judicial review of conflicted ERISA administrators who have discretion to interpret the terms of the plans they administer.

CONCLUSION

For these reasons as well as those cited in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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2. There is no evidence in the record that would allow GE properly to invoke the successor employer provisions of its employee benefit and pension plans.